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THE EFFECTIVENESS OF FACT-FINDING
IN PUBLIC EMPLOYEE COLLECTIVE BARGAINING
IN MONTANA

By

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B.A., University of Montana, 1968

Presented in partial fulfillment of the requirements for
the degree of

Master of Public Administration

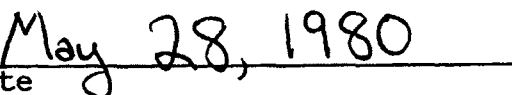
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INTRODUCTION

The past several decades have seen a rapid spread of union organization among public employees. Membership growth rates are far in excess of the modest expansion in the private economy. In addition, increasing militancy has been exhibited by both the old and new public employee unions. As these developments have occurred, public employers have dealt with them in a variety of ways. Procedures developed for use in private industry have been incorporated into the personnel policies of municipal, state, and federal employers. But as has been pointed out:

The resolution of disputes over the terms of a new agreement . . . may require a different approach from the one used in private industry. In private industry our present national labor policy places heavy emphasis on the role of economic conflict in dispute settlement. In the public sphere, however, law and tradition make the use of the strike illegal, or, at least, far less appropriate. Reliance is placed instead upon other procedural devices such as admonition by influential government leaders, mediation, fact-finding with or without recommendations, voluntary arbitration, and referral of disputes to the appropriate political body for passage of legislation.¹

¹James L. Stern, "The Wisconsin Public Employee Fact-Finding Procedure," Industrial and Labor Relations Review, XX, No. 1 (1966), 3.

Dispute resolution procedures in the public sector have received a great deal of attention. Strikes and other concerted action by public employees, when they do occur, are usually given extensive media coverage. Furthermore, the public has a direct consumer interest in these matters. For example, parents have a serious interest in the quality of education in addition to their desire to avoid teacher strikes.²

The intent of this paper is to evaluate the effectiveness of the fact-finding process in the area of public employee collective bargaining in Montana. A full appreciation of any aspect of the fact-finding procedure requires an understanding of how fact-finding is incorporated into the impasse structure of the law which governs it. In Montana, this law is the Public Employees Collective Bargaining Act.³

The Act, which was adopted by the Montana Legislature in 1973, was modeled on the federal Labor Management Relations Act.⁴ It represented the state's first comprehensive legislation relating to labor relations, and affected the majority of public employees. At the time of the enactment,

²William E. Simkin, Mediation and the Dynamics of Collective Bargaining (Washington, D.C.: The Bureau of National Affairs, Inc., 1971), p. 348.

³Sections 39-31-101 through 39-31-409, Montana Code Annotated, 1979.

⁴Emilie Loring, "Labor Relations Law in Montana," Montana Law Review, XXXIX (1978), 40.

both the university system and the public school system, the latter then covered by its own act, were excluded from coverage. However, the university was included in 1974 and the public schools in 1975.⁵ Except for registered nurses in public health care facilities and professional engineers and engineers in training, the Act now covers all of Montana's non-management public employees.

The Collective Bargaining Act provides a mechanism for the election of an exclusive representative for purposes of collective bargaining and makes unlawful, as unfair labor practices, certain behavior of public employers and labor organizations. Labor organizations are permitted to bargain collectively with employers with respect to "wages, hours, fringe benefits, and other conditions of employment."

The collective bargaining process itself is a matter between the employer and the labor organization, and, as long as both sides bargain in good faith, is not subject to state regulation. But in the event the employee organization and the public employer are unable to come to an agreement and bargaining is deadlocked, the law provides procedures to resolve the dispute. The Act requires the parties to request mediation, either if agreement has not been reached after a reasonable period of negotiation or if a dispute still exists on the date of expiration of a prior collective bargaining agreement. Upon petition, the Board

⁵ Ibid.

of Personnel Appeals (the agency which administers the law) supplies a mediator to assist the parties in reaching an agreement. Costs of mediation are borne by the Board.

If mediation is unsuccessful, the parties may request fact-finding, or the Board itself may initiate fact-finding. In this process, the Board submits to the parties a list of names of five possible fact finders. The parties alternately strike two names. The remaining name is that of the person designated as the fact finder. The fact finder then meets with the parties and makes written findings of fact and recommendations for resolution of the dispute. The Act does not require that either party accept the fact finder's recommendations.

The fact finder may make his report public five days after it is submitted to the parties. If the dispute is not settled, he must make it public fifteen days after submission to the parties. It is apparent that the legislature believed that public pressure brought to bear upon the parties as a result of the fact finder's report would encourage the parties to settle the dispute.⁶

It should be noted that the Act also permits the parties voluntarily to agree to submit any or all of the issues in dispute to final and binding arbitration. If such an agreement to arbitrate is reached by the parties, the arbitration, by law, supersedes the fact-finding procedures.

⁶Ibid., 43.

Unlike public employee collective bargaining laws in some other states, Montana does not require that parties refrain from strikes or lockouts during mediation or fact-finding. The Montana Supreme Court upheld the right of public employees to strike in State Department of Highways v. Public Employees Craft Council.⁷ It can be assumed that even though the Montana statute permits strikes by public employees, the impasse procedures are designed to secure a settlement of the dispute without incurring a strike. As noted in the report of the Twentieth Century Fund Task Force on Labor Disputes in Public Employment, "A broad consensus finds an overriding public interest in the continuous operation of vital government services."⁸

What exactly is fact-finding? The basic idea is that a neutral determination of the issues in dispute, particularly when accompanied by recommendations for their settlement, will either bring public pressure to bear upon the parties or will force the parties themselves to take a new view of their own and the public's interest. In any event, it is assumed that the parties will come to a settlement at or near the terms suggested by the fact finder. As Charles Rehmus points out:

. . . the procedure envisages a final settlement to be one still made by the parties themselves and, to this degree, acceptable to them. It

⁷As found in Ibid., 49.

⁸Pickets at City Hall (New York: The Twentieth Century Fund, 1970), p. 3.

thereby retains an important element of voluntarism in the establishment of collective bargaining agreements.⁹

But Spero and Capozzola also remind us that:

Finding the facts is not as antiseptic or easy as would appear. There is inevitably a tendency for each side to present only those facts favorable to it. If the issues involved are complex, the plethora of facts produced by one side is inexorably controverted by statistics elicited from the other side. And all the facts are presented in a judicial atmosphere wafted about by political breezes from the outside.¹⁰

William Simkin, Director of the Federal Mediation and Conciliation Service during the Kennedy and Johnson administrations, hastens to add that:

Even if one party has not faced up to unpleasant facts, the issue is not the facts but whether they are decisive or should be given little or no weight. In other words, it is the significance of the facts, not the facts themselves, that is the core of the dispute on the issues.¹¹

Fact-finding has perhaps received more attention than any other type of procedural mechanism used to deal with bargaining impasses in the public sector. The first reason for this attention has been the hope that fact-finding could be an effective strike substitute. It also is due in part to the fact that there has been considerable experience with

⁹Charles M. Rehmus, "Fact-Finding and the Public Interest" (paper presented at the Inaugural Convention of the Society of Professionals in Dispute Resolution at Reston, Virginia, October 17-19, 1973), p. 3.

¹⁰Sterling D. Spero and John M. Capozzola, The Urban Community and Its Unionized Bureaucracies (New York: Dunellen Publishing Co., 1973), p. 282.

¹¹Simkin, p. 238.

mediation and grievance arbitration in the private sector but little previous experience with fact-finding.¹²

Another reason that accounts for the attention paid to fact-finding is the confusion about the process. Many state laws and a sizable group of students in the field speak of it as advisory arbitration while others think of it as mediation. There appears to have been a considerable debate among scholars over whether fact-finding is strictly a formal adjudicatory process, or one of adjustment. But more recently there seems to be agreement that the process is a mixture of both. This idea is best stated by Rehmus:

It seems to me that the answer as to what set of facts one will decide upon is almost entirely a matter of values, of passing judgment on the various sets of facts that are presented. Even those who opt for the adjudicatory approach, therefore, seem to me to have to face up to the fact that persuasion and mediation are inherent in the process if it is to be at all successful.¹³

The flexibility of the process may be the very reason that fact-finding persists as a popular dispute resolution procedure in the public sector. Legislators, and perhaps many of the parties, continue to believe that fact-finding has some of the advantages of both mediation and arbitration and few of their weaknesses. Any procedure that has such great appeal for legislators deserves attention and careful

¹²Thomas P. Gilory and Anthony V. Sinicropi, "Impasse Resolution in Public Employment: A Current Assessment," Industrial and Labor Relations Review, XXV, No. 4 (1972).

¹³Rehmus, p. 9.

study. Furthermore, as Arbitrator Arnold Zack has pointed out:

It is increasingly evident that the problems of public employment collective bargaining are in flux and that the effective procedures of today may prove to be ineffective within the near future, particularly as the sophistication, as well as perhaps ¹⁴the militancy of the parties continues to grow.

Therefore it is indeed appropriate and necessary to undertake a study of the effectiveness of fact-finding in public employee collective bargaining in Montana. In this way, we can recognize weaknesses in the existing procedures, anticipate possible areas of future difficulty and adapt existing machinery for dispute resolution so that it may be more effective in the future.

¹⁴Arnold M. Zack, "Improving Mediation and Fact-Finding in the Public Sector," Labor Law Journal, XXI, No. 5 (1970), 260.

REVIEW OF PREVIOUS STUDIES

Studies of fact-finding have been conducted in a number of different states. A review of these studies brings to light various concepts which are important in evaluating the effectiveness of fact-finding in Montana.

One of the earliest studies of fact-finding was conducted in Wisconsin. James Stern cited four general standards against which one can measure whether fact-finding has been successful. These include (1) the results of the procedure--that is, whether the disputes giving rise to the fact-finding petitions were successfully or unsuccessfully resolved; (2) the opinions of those using the procedure and those administering it; (3) whether fact-finding has been over- or under-used and whether its availability has tended to affect positively or negatively the collective bargaining process; and (4) whether the procedure has reduced conflict and served as a substitute for the strike.¹⁵

In the same study, Stern concluded that the fact-finding process was being utilized by an increasing number of teacher organizations throughout the state and appeared to be both highly regarded and working well. Eight years

¹⁵Stern, 9.

later, in 1974, Gatewood found that fact-finding was no longer held in such high regard. He concluded that fact-finding was serving to prolong negotiations to the extent that the parties automatically incorporated it into the bargaining process.

Given the availability of factfinding, serious bargaining may not ensue until after the fact finder's recommendations have been made. Where this tactic has been employed, labor organizations generally view favorable recommendations as the basis upon which their actual demands will be formulated. Likewise, boards have taken such recommendations to define the limits from which they will bargain down in negotiations. In addition, disputes have been protracted to the extent that factfinding has been petitioned solely for the purpose of stalling, thus allowing the parties to escape serious and continuous bargaining.¹⁶

Most theories of the bargaining process suggest that "hard bargaining" or movement will occur when the costs of continuing the dispute exceed the costs of making a compromise or concession to settle the dispute. To the extent that multiple steps are built into the impasse procedure that proceed from milder to strong forms of intervention, final resolution may be even further removed from the initial bargaining process.¹⁷ This phenomenon has been discussed in the literature as the "chilling effect" because

¹⁶Lucian B. Gatewood, "Factfinding in Teacher Disputes: The Wisconsin Experience," Monthly Labor Review, XCVII, No. 10 (1974), 49.

¹⁷Thomas A. Kochan, "Dynamics of Dispute Resolution in the Public Sector," in Public Sector Bargaining, ed. by Benjamin Aaron, Joseph R. Grodin and James L. Stern (Washington, D.C.: The Bureau of National Affairs, Inc., 1979), p. 176.

it has a negative effect on the collective bargaining process.

Some critics of fact-finding believe that it hinders the effectiveness of mediation. Under Montana law, mediation is the first step in dispute resolution so it is important to consider this criticism in a study of fact-finding. Zack maintains that:

Mediation, with fact-finding waiting in the wings, sometimes takes on the appearance of a rite which must be gone through before the parties get to real crisis bargaining. The problem is made somewhat worse by the fact-finder's tendency to delve enthusiastically into what transpired at mediation so he can gauge the area of acceptability of his own report. If this happens in one year's impasse, it assuredly will lead the parties the next year to hold offers of compromise close to their chest during mediation, recognizing that they will have to yield¹⁸ even more when they get to fact-finding and beyond.

Another phenomenon often discussed in the literature of collective bargaining is the "narcotic effect." This describes the situation in which the parties become over-dependent on the impasse procedures. In this respect, fact-finding could become the first and not the final step in collective bargaining. As stated by Wellington and Winter:

The post-impasse procedure should not hinder collective bargaining. The major hope for avoiding strikes in the public sector is not the post-impasse procedures but the bargaining process; not the resolution of impasses but their avoidance. Resort to post-impasse procedures, therefore, ought not to be so automatic as to become a routine step in the process of reaching a settlement. For if it does, serious bargaining may be deferred until

¹⁸Arnold M. Zack, "Impasses, Strikes and Resolution," in Public Workers and Public Unions, ed. by Sam Zagoria (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1972), p. 112.

the procedures are invoked and impasses will also become routine.¹⁹

Thus for the fact-finding procedure to be effective, some deterrents must be incorporated into the procedure to encourage meaningful collective bargaining and discourage automatic resort to the impasse procedures. One possible deterrent is cost.

Where fact finding is provided without cost to the parties and where its invocation is fairly automatic under the statutory procedures, the parties may have less incentive to accept the results than where the procedure is one of their own choosing and their own financing.²⁰

Another deterrent to the fact-finding process is investment of the time required by the parties to exhaust the impasse procedures. A final deterrent is the role of public opinion.

Uncertainty as to public opinion is also assumed to act as a deterrent and to encourage negotiations. That is, inability to predict the direction in which factfinding will guide public opinion makes the procedure so unattractive that the parties would rather reach an agreement without public recommendations.²¹

The concept of acceptability relates generally to the opinions of the parties concerning the fact-finding process--whether they accept the recommendations of the fact

¹⁹Harry H. Wellington and Ralph K. Winter, Jr., The Unions and the Cities (Washington, D.C.: The Brookings Institution, 1971), p. 174.

²⁰Jean T. McKelvey, "Fact Finding in Public Employment Disputes: Promise or Illusion?" Industrial and Labor Relations Review, XXIV, No. 2 (1971), 540.

²¹William R. Word, "Factfinding in Public Employee Negotiations," Monthly Labor Review, XCV, No. 2 (1972), 61.

finder in specific instances, as well as whether they regard fact-finding as an acceptable procedure for settling disputes. The role that the fact finder plays in the process is also important and it influences the acceptance of fact-finding by the parties. Pegnetter concluded in his study of the criteria used by fact finders, that most fact finders are concerned primarily with acceptability by the parties when they write their recommendations.²²

In summary, based on studies elsewhere, one would expect that if the fact-finding process in Montana is effective, then certain conditions could be identified. First of all, the availability of the fact-finding process should not have a negative effect on the collective bargaining that takes place before the fact-finding procedures are put into operation. There should be evidence that the availability of fact-finding does not cause the parties to refrain from serious bargaining prior to the initiation of the impasse procedures. In addition, the effectiveness of mediation of disputes by Board of Personnel Appeals staff members prior to fact-finding should not be hampered by the availability of the fact-finding process. Secondly, if fact-finding is effective, there should be evidence that the parties have not become overdependent on the process. It would be possible to identify adequate deterrents to the overuse of

²²Richard Pegnetter, "Fact Finding and Teacher Salary Disputes: The 1969 Experience in New York State," Industrial and Labor Relations Review, XXIV, No. 2 (1971), 229.

fact-finding such as the investment of time and money and the fear of adverse public opinion. Finally, one would expect that the fact finders themselves strive to make recommendations which are acceptable to the parties and that the parties do accept the recommendations made by the fact finders. In addition, the parties would be expected to view the fact-finding process as an acceptable one for resolving their bargaining disputes.

METHODOLOGY

Research to determine the effectiveness of fact-finding in the public sector in Montana was conducted with the cooperation of the Administrator of the Board of Personnel Appeals during the summer and fall of 1979. Much of the research is based on the work of Yaffe and Goldblatt²³ whose study of fact-finding is perhaps one of the most detailed.

Data for the study was collected by means of questionnaires sent to both fact finders and parties who participated in the fact-finding process during the years 1977 and 1978. In order to broaden the sample, as well as to gather data about what factors may have contributed to settlement before a fact-finding hearing was held, data was solicited for all cases in which fact-finding was requested or recommended, whether or not a hearing was actually held. A digest of the particular case accompanied each questionnaire. The digest contained a summary of each party's position on each issue in dispute, as well as the fact finder's recommendation and rationale. The digests were based on the

²³Byron Yaffe and Howard Goldblatt, Fact Finding in Public Employment Disputes in New York State: More Promise Than Illusion (Ithaca, N.Y.: Cornell University, 1971).

fact finder's reports from the files of the Board of Personnel Appeals. A cover letter explained the questionnaire and the study. Care was taken to assure the respondents that all replies would be strictly confidential.

During the years 1977 and 1978, there were twenty-eight cases in which fact-finding was requested by the parties and/or recommended by a Board of Personnel Appeals mediator. Of this number, eight cases were settled prior to or without resort to formal fact-finding. Of the remaining twenty cases, the fact finder mediated a settlement in three instances. Thus, in only seventeen cases were formal fact-finding hearings conducted and reports written.

Fifteen completed questionnaires were received from employee organizations. Of these, twelve responses were from cases in which formal fact-finding was held, two responses were from cases in which a formal fact-finding hearing was not held and one was from a case in which a settlement was mediated by the fact finder. Following is a breakdown of the employee groups involved in the twenty cases in which the fact-finding took place:

State, County and Municipal Employees	10 cases
Non-Professional School District Employees	4 cases
Teachers	2 cases
Firemen	2 cases
Police	2 cases

Fifteen completed questionnaires were received from employers. Of this number, twelve responses were from cases in which formal fact-finding was held and three were from cases in which no formal fact-finding hearing was held. Seventeen completed questionnaires were received from fact finders. In thirteen of these cases, a completed questionnaire was also received from at least one of the parties.

Several factors contribute to the lack of response by some of the participants to whom questionnaires were sent. A number of individuals are no longer holding the position they did in 1977 and/or 1978. Even though the cover letter urged the recipient to forward the questionnaire to the person most able to answer, this apparently was not done in most cases in which the person responsible for bargaining in 1977 and/or 1978 no longer had that responsibility. Some recipients were just too busy to take time to answer the questionnaire. Follow-up phone calls indicated that in several instances individuals were moving offices or for some other reason did not have access to the information required to complete the questionnaire. Nonetheless, the responses which were received provide an adequate overview of how well fact-finding is working in Montana.

In examining the effectiveness of fact-finding, data was collected with the aim of focusing on three major concepts--that is, whether the fact-finding procedure (1) has a positive effect on the collective bargaining process; (2) provides adequate deterrents to overdependence on the

process; and (3) is accepted by the parties as a satisfactory process for resolving their bargaining disputes. For each of the three major concepts, certain factors were identified which would determine whether or not conditions were present which contributed to the effectiveness of fact-finding.

RESEARCH FINDINGS

In attempting to determine whether or not the availability of fact-finding has a positive effect on the collective bargaining process, a number of factors must be considered. Is there evidence of "good faith" bargaining prior to fact-finding? Are all issues in dispute discussed prior to resort to fact-finding? What is the effect of mediation prior to fact-finding? In what stage of the negotiations does most of the "hard bargaining" take place? What is the number and the nature of the issues submitted to fact-finding? The answers to these questions will indicate whether or not the presence of fact-finding keeps the parties from engaging in serious bargaining in the period prior to the initiation of the fact-finding procedures.

In studies of fact finding experiences in Wisconsin and New York State, it was found that:

Specific examples of employer behavior characterized as bargaining in bad faith included using procedural technicalities to stall the bargaining process and unilaterally granting wage increases during negotiations. Undesirable employee behavior was sometimes blamed on a tendency to think that collective bargaining, along with fact-finding, if needed, would solve all the past problems. These high expectations led to aggressive and sometimes unrealistic negotiating demands.²⁴

²⁴Word, 61.

Research indicates that in Montana good faith bargaining prior to fact-finding was present in most of the cases reported. In two cases, unfair labor practice charges were prepared by one party but were not filed. In two other cases, unfair labor practice charges were filed alleging bad faith bargaining but were withdrawn upon settlement of the contract. In another case one of the parties filed a number of charges but all were dismissed. It can be assumed that this activity was in the nature of bargaining strategy by the parties rather than any real indication of bad faith. In fact, during the time period studied, the Board of Personnel Appeals sustained unfair labor practice charges in only one case. In this instance, the employer was found to have committed a number of unfair practices such as engaging in "conditional bargaining," recognizing and bargaining with a rival employee organization when there was a real question of majority status, and making unilateral changes in working conditions that were unsettled points in negotiation. This particular contract was still unsettled as of January 1980. Bad faith negotiating is often attributed to the parties' lack of experience. The fact that in 57 percent of the cases examined the parties had been engaging in collective bargaining and reaching agreements for five years or longer probably accounts for the presence of good faith bargaining.

In the seventeen cases for which this information was available, all parties reported that all issues in dispute had been discussed prior to the fact-finding process.

A majority of the parties (81 percent) expressed the opinion that the potential of fact-finding had no effect or an insubstantial effect on their prior negotiations (see Table 1).

TABLE 1
EFFECT OF POSSIBILITY OF FACT-FINDING
ON PRIOR NEGOTIATIONS

Effect	Employers (%)	Employee Organizations (%)	All Parties (%)
Substantial	30	10	19
Insubstantial	30	36	33
No Effect	40	54	48

The following statement is representative of the views of most of the respondents:

I don't think either party gave much thought to fact-finding until the fact of impasse developed.
(Employer)

Employers, more often than did employee organizations, tended to think that the possibility of fact-finding had a substantial effect on their prior negotiations. Indicative of the impact that the potential of fact-finding did have on some of the parties are the following statements:

From management's standpoint fact-finding serves no purpose other than to delay final resolution. Union membership tends to not settle until all third party steps have been used, thinking they may receive a few cents more. (Employer)

If any, it chilled the effectiveness of prior mediation and apparently limited the number and

the earnestness (almost pro forma) of bargaining sessions. (Employee Organization)

A large majority (70 percent) of responding parties said that most of the "hard bargaining" in their disputes occurred before fact-finding (see Table 2). This indicates that the parties are seriously engaging in collective bargaining and that a "chilling effect" is not present because of the availability of fact-finding.

TABLE 2

STAGE OF NEGOTIATIONS WHERE MOST OF THE
"HARD BARGAINING" TOOK PLACE

Stage	Percent
Before fact-finding	70
During fact-finding	15
After fact-finding	5
Before and during fact-finding	5
Before, during and after fact-finding	5

The number of issues submitted to fact-finding ranged from one to seven with the average being three to four and the median being three. Hence, the parties are resolving most issues in dispute through the collective bargaining process prior to fact-finding. The nature of the issues submitted to fact-finding is probably more important than the number in determining whether or not a "chilling effect" is present because of the fact-finding process. The parties were asked to list the major issues which were submitted to fact-finding (see Table 3). As can be seen from the replies

of the parties, the major issues submitted to fact finding are those which generate deadlocks in the private sector as well.

TABLE 3
ISSUES CONSIDERED AS MAJOR
(BY CASE)

Issue	Total (Of 18 Cases)
Wages and salaries	18
Fringe benefits	13
Work schedule and manpower	11
Management rights	3
Settlement of disputes	2
Composition of bargaining unit	2
Subcontracting	1
Contract dates	1
Union security (agency shop)	1

In the opinion of the parties, mediation prior to fact-finding by Board of Personnel Appeals staff members does not appear to have been very effective (see Table 4). The parties were asked to evaluate the effectiveness of mediation prior to fact-finding as a means of (a) reducing the number of issues to be submitted to formal fact-finding; (b) narrowing the gap between the parties; and (c) serving as an educational process. While it appears that employee organizations view mediation as an effective impasse procedure more often than do employers, the failure of this procedure to be perceived as effective by a majority of the parties may indicate that the parties are, indeed, "holding back"

until fact-finding. On the other hand, the impressive success of mediation prior to fact-finding by the Board of Personnel Appeals must also be recognized. During 1977 and 1978, approximately 105 cases were mediated by the staff of the BPA. Of this total, only twenty cases went on to formal fact-finding. In other words, prior mediation is successful in about 81 percent of the cases which reach deadlock. In light of this fact, the negative evaluation of mediation by the parties may reflect the inflexibility of their own positions and their deadlock more than it does the actual effectiveness of the mediation process in relation to the fact-finding which follows it.

TABLE 4
EFFECT OF MEDIATION AS REPORTED
BY FACT-FINDING PARTICIPANTS

Effect	Employers (%)	Employee Organizations (%)	Total (%)
<u>Reducing the Number of Issues</u>			
Substantial	22	25	23.5
Insubstantial	33	75	53
No Effect	44	--	23.5
<u>Narrowing the Gap Between the Parties</u>			
Substantial	22	40	32
Insubstantial	44	40	42
No Effect	33	20	26
<u>Serving as an Education Process</u>			
Substantial	22	33	28
Insubstantial	--	56	28
No Effect	78	11	44

Thus, research findings are inconclusive concerning whether or not mediation prior to fact-finding is hindered by the availability of fact-finding procedures. But research does indicate that (1) good faith bargaining is present prior to and during fact-finding in a significant majority of cases; (2) all issues in dispute are discussed prior to resort to fact-finding and the potential of fact-finding has little effect on prior negotiations; (3) major issues submitted to fact-finding are the same as those which lead to deadlock in the private sector; and (4) most of the serious bargaining takes place before fact-finding is introduced. Thus, it appears that fact-finding does not have a negative effect on public employee collective bargaining in Montana.

Three major deterrents to the utilization of fact-finding can be identified. These are the investment of time and money and the fear of adverse public opinion. The opinion of the parties is the most important factor in determining whether or not these three truly do deter employers and employee organizations from resorting to the use of the fact-finding procedure too frequently.

Cost appears to be no deterrent at all to invoking the fact-finding procedure in Montana. Most states divide the cost of fact-finding between the parties.²⁵ In Montana, it

²⁵Edward B. Krinsky, "Public Employment Fact-Finding in Fourteen States," Labor Law Journal, (September, 1966), 540.

is split three ways among the parties and the Board of Personnel Appeals. The BPA maintains a list of fact finders from which the parties are supplied with a list of five, one of which is selected by them as the fact finder in their dispute. The BPA sets the fact finders' fee at \$100.00 per day for hearings and preparation of the report, plus expenses incurred. The parties also have the option of mutually agreeing upon any qualified fact finder of their choice without requesting a list from the BPA. But in such a case, it is the policy of the BPA that its share of the cost is based on what its share would be of the maximum fee of \$100.00 per day, the parties picking up the remaining cost if the fact finder they select charges more than that fee.

During the time period studied, the parties' share of fact-finding costs ranged from \$71.57 up to \$640.09. The average cost was \$191.25 and the median cost was \$142.86. Not one responding party stated that cost would deter them from utilizing fact-finding again in the future. Of course, it is possible, since only those parties who proceeded to fact-finding were questioned, that some unions accepted management's last offer rather than incur the cost of fact-finding. There did not appear to be any evidence that the present fee schedule is so low that the parties are unduly attracted to the procedure. On the other hand, the fee and the total cost are apparently not so high that they act as a deterrent.

Time invested in pursuing the process also does not seem to serve as a deterrent. In the cases examined, the time from the beginning of negotiations until declaration of a deadlock ranged from ten days to eight months, the average time being about three months. The total time from the beginning of negotiations until the date of the issuance of the fact finder's report ranged from 43 days to eleven months, the average time being about six months. Thus, the parties spent about as much time utilizing the impasse procedures to resolve their disputes as they spent bargaining up until the time a deadlock was declared. It is also interesting to note that the law states that upon completion of the hearing, "but no later than 20 days from the day of appointment," the fact finder should make his report. Nevertheless, the average time between the date the fact finder was appointed and the date the report was issued was thirty-two days. In fact, in only two of the thirteen cases reported did the fact finder meet the twenty-day deadline. The important point here is that the statutory time limits regarding the issuance of the report and/or its publication may be extended if the parties jointly agree. It appears that time did not impose any significant constraint upon the parties in the cases studied.

Theoretically, uncertainty as to public opinion is also assumed to act as a deterrent and to encourage the parties to negotiate a settlement before the introduction of fact-finding. Although fact-finding as originally designed

was intended to result in thoughtful public opinion which would induce the parties ultimately to accept the recommendations of an impartial third party, it would appear that such opinion has played a minimal role in the fact-finding process in Montana. In only three cases were the proceedings attended by the public and/or the press. In the opinion of the participants, public and press attendance helped achieve settlement in one case, hindered the achievement of a settlement in another, and had no effect in the third. In one additional case, the press attended a post-hearing meeting of the parties at which the fact finder discussed and explained his report. In this case, there was a strike in progress and the fact finder believed that the attendance of the press helped achieve settlement.

The responses from the participants concerning the presence of public interest in the proceedings were often varied concerning the same case. That is, sometimes one party reported that there was public interest in a case while the other party reported none. In some instances, the fact finder reported public interest in a case while the parties did not. Since it is the parties' perception of public interest which would act as a deterrent, it seems best to present the results in those terms. Of the responding parties, employee organizations perceived public interest to be present more often than did employers. Ten employers responded to the question of whether or not there was general public interest in the fact-finding proceedings.

Seven employers answered "no" to this question while three answered "yes." Nine unions responded to the same question. Five unions reported that there was public interest in the fact-finding proceedings, three said there was no public interest and one answered "don't know." In only five cases were responses received from both parties to the dispute. Furthermore, in only one instance did both parties agree on their response to the public interest question; they both said there was no general public interest in their case. In the other four cases, one party perceived that public interest was present while the other did not.

In those instances where public pressure was exerted (out of a total of nineteen cases reported), the means used to exert pressure were through newspapers (31.5 percent), other news media (18 percent), community pressure groups (18 percent) and political channels (10.5 percent). All of the participants agreed that the public pressure which was exerted was on both of the parties equally and, if on just one party, then on the employer (see Table 5).

TABLE 5
PUBLIC PRESSURE EXERTED

Extent of Pressure	Percent
Solely on employer	8
Mostly on employer	31
Equally on both parties	46
Mostly on employee organizations	15
Solely on employee organizations	--

The effect of this public pressure, though, was insubstantial or nonexistent. In fact, in only one case did the parties report that public pressure had a substantial effect on helping them to achieve settlement. It is interesting to note that this case is one in which fact-finding was not utilized even though recommended by a Board of Personnel Appeals mediator. It involved police and was settled after a strike. These factors no doubt contributed to the extent of the public pressure applied. In general, although the parties may perceive some public interest in fact-finding in Montana, the public interest does not generate substantial enough pressure on the parties to affect their actions or to act as a deterrent to fact-finding.

In summary, research indicates that there do not appear to be sufficient deterrents to overdependency on fact-finding in Montana. On the other hand, the fact that twenty cases were submitted to fact-finding in this two-year period, out of the hundreds of contracts negotiated, does not appear to demonstrate an overdependency on the process, even for a state with Montana's small population. A possible explanation is that the right of Montana's public employees to strike also acts as a deterrent to the use of fact-finding. Parties may settle prior to fact-finding because they know that, should fact-finding fail, they would be faced with a strike situation. This knowledge could act as an even stronger deterrent than the fear of adverse public opinion or the investment of time and money.

Another issue which must be considered in evaluating the effectiveness of fact-finding is the acceptability of the process to the parties. The role of the fact finder can play an important part in contributing to this acceptance. A number of factors help determine how the fact finder's role relates to acceptability. What is the intent of the fact finder's recommendation, a basis for settlement or a guideline for further bargaining? What criteria are used by fact finders in writing their recommendations? What is the fact finder's perception of the acceptability of his report? What attempts are made by the fact finder to resolve the issues in dispute?

First of all, as stated previously, it is reasonable to assume that most fact finders are concerned with acceptance by the parties when they write their recommendations. Montana fact finders apparently try to make recommendations which serve as a basis for settlement as well as guidelines for further negotiations should the recommendations not be accepted. In 77 percent of the cases, fact finders reported that their recommendations were intended to serve as the basis for settlement on all issues in dispute. In the remaining 23 percent of the cases, the recommendations were intended to serve as a basis for settlement on the major issues only. In 79 percent of the cases, fact finders reported that their recommendations were intended to establish guidelines for further negotiations on all issues in dispute while in 21 percent their recommendations were intended to

establish guidelines on major issues only. A large majority of the fact finders reported that they considered all the issues in dispute in their reports.

After listening to each side present its position on the issues in dispute and determining the facts of the case, the fact finder must make a judgment concerning the final disposition of each issue. Although some state laws specify the criteria that fact finders must consider in formulating their recommendations, this is not the case in Montana. In this study, the fact finders reported that the criteria used most frequently in writing their recommendations were "acceptability," "equity," and "ability to pay" (see Table 6).

TABLE 6
CRITERIA USED BY FACT FINDERS
IN FORMULATING RECOMMENDATIONS

Criteria	No. of cases in which used
Acceptability	10
Equity	10
Ability to pay	10
Practicality of implementation	8
Comparability	8
Cost of living	8
Compromise	7
Other:	
Legislative intent in applying salary schedules	1

The use of the "acceptability" criterion indicates that the fact finder wrote recommendations which he believed would be accepted by the parties. If he applied the "equity"

criterion, the fact finder made recommendations which he believed to be fair and just, without taking into account whether or not the parties would in reality find them to be acceptable, rather in the manner of the arbitrator. The fact finder who applied the "ability to pay" criterion based his decision on the employer's ability (or inability) to financially meet the wage demands of the employee organization. (Wages were in dispute in every case reported in this study.) Use of the "practicality of implementation" criterion by a fact finder indicates that he took into consideration the practicality (or impracticality) of implementing a proposal, aside from its other positive or negative qualities. If a fact finder applied the "comparability" criterion, he used, as a standard of judgment, comparisons of the parties (usually the employee organization) to other similar groups in different geographical areas, in terms of economic position or possession of certain benefits. A fact finder who utilized the "cost of living" criterion tried to determine, and to reflect in his recommendation, a wage increase that would keep pace with the cost of living. As Yaffe and Goldblatt point out, the "compromise" criterion may be distinguished from the "acceptability" criterion in that it usually connotes a "splitting of the difference" without taking into account the power relationship between the parties.²⁶ In other words, when using the "compromise"

²⁶Yaffe and Goldblatt, p. 51.

criterion, a fact finder made recommendations which required concessions equally by both parties. By contrast, when using the "acceptability" criterion, the fact finder made recommendations based on his knowledge of the highest priorities of both sides and the proposals each side might be willing to sacrifice. Many fact finders applied more than one of these criteria in a single case but the majority indicated that "acceptability" was the most important criterion in the development of their recommendations (see Table 7).

TABLE 7
MOST IMPORTANT CRITERIA
IN FORMULATING RECOMMENDATIONS

Most Important Criterion	No. of Cases
Acceptability	8
Practicality of implementation.	2
Equity	2
Comparability	1
Compromise	1
Cost of living	1
Ability to pay	0

Further evidence is available that Montana fact finders attempt to formulate recommendations that are acceptable to the parties in that the great majority (86 percent) stated that their recommendations were written either "solely for the parties" or "mostly for the parties, but also for the community." Fourteen percent stated that their recommendations were written "equally for the parties and the community."

Fourteen percent stated that their recommendations were written "equally for the parties and the community." It appears that Montana fact finders are convinced that their main goal is to achieve settlement of disputes by encouraging the parties themselves to reach agreement based upon the recommendations of the fact finders.

Overall, the fact finders were not particularly confident that the parties would accept their recommendations in total. Twenty-three percent of the fact finders were confident that the employee organizations would accept all of the report, while only twenty-one percent were confident that the employers would accept the total report. On the other hand, 75 percent of the fact finders were confident that both the employee organizations and the employers would accept at least part of the report. Overall, the fact finders were more confident of the acceptability of their recommendations by the employee organizations than by the employers.

In the three cases in which the fact finders were confident that the employee organizations would accept the total report and in the three different cases in which they were confident that the employers would accept the total report, the parties did accept the total report in each instance. It is interesting to note that in all of the aforementioned cases but one the fact finder initially attempted to mediate the dispute, or at least made some informal attempts to help the parties reach a settlement prior to initiating more

formal fact-finding procedures. As noted in the discussion of the Montana Public Employees Collective Bargaining Act, fact finders are not prohibited from attempting to mediate a settlement of the dispute. Overall, fact finders reported that they mediated, or informally tried to help the parties settle the dispute, in 60 percent of the cases. In three cases, fact finders were successful in their attempts at mediation and a settlement was reached voluntarily by the parties without the necessity of the issuance of a fact-finding report. The other fact finders who reported that they made attempts at mediation stated that they spent an average of 27 percent of their time mediating during the fact-finding hearing.

The parties were asked to evaluate the effectiveness of the fact finders' attempts at mediation during the course of fact-finding hearings. One hundred percent of the responding parties stated that the fact finder's attempt to mediate had no effect or an insubstantial effect on reducing the number of issues in dispute and on narrowing the gap between the parties. Twenty-five percent of the parties responded that the mediation attempt by the fact finder had a substantial effect in terms of serving as an educational process, while 75 percent stated that the effects were insubstantial in this area. In comparison, the fact finders themselves were of the opinion that their attempts at resolving the disputes informally during the fact-finding proceedings were generally successful (see Table 8 for a comparison of the

opinions of the parties and the fact finders regarding the effectiveness of mediation).

TABLE 8
EFFECT OF MEDIATION DURING FACT-FINDING

Effect	Opinion of Parties (%)	Opinion of Fact Finders (%)
<u>Reducing the Number of Issues</u>		
Substantial	--	60
Insubstantial	50	20
No Effect	50	20
<u>Narrowing the Gap Between the Parties</u>		
Substantial	--	40
Insubstantial	75	20
No Effect	25	20
<u>Serving as an Education Process</u>		
Substantial	25	83
Insubstantial	75	17
No Effect	--	--

Interpreting the research findings regarding the effectiveness of mediation by the fact finders is somewhat difficult because of conflicting responses to the questionnaires. In a number of cases, the fact finder reported that he made attempts at mediation but the parties to the dispute reported that he did not. In other cases, the parties reported that the fact finder attempted to mediate their dispute while the fact finder reported making no such attempt. Finally, in some cases, the parties to the dispute disagreed about whether or not the fact finder attempted to mediate.

Nonetheless, in five out of six cases in which the fact finder reported making an attempt at mediation, both employers and employee organizations reported accepting the final recommendations of the fact finders. This may indicate that mediation attempts by the fact finders were more effective in contributing to the eventual acceptance of the recommendations by the parties, and the settlement of the dispute, than the parties actually perceived or reported.

The expertise of fact finders is an important factor which cannot be overlooked. Several responding parties rated the effectiveness of fact-finding very low because of what they perceived to be a lack of expertise on the part of the fact finder.

The fact-finding didn't seem to do any good because the fact finder decided in favor of the city on all major issues but the city agreed to all union original proposals. This fact finder, in my opinion, cannot be considered impartial because of the report he turned in. I have never seen so many misread and misunderstood and maybe just ignored facts in any report. The union presented signed documents by the city that supported the union's case and the fact finder ignored these. In my opinion, the fact-finding was a waste of both parties' time and money. (Employee Organization)

Fact-finding should be more effective in other situations. In this case, both sides felt the fact finder failed to grasp the issue and his recommendation that the parties seek an Attorney General's opinion on the legality of the pay plan was inappropriate and not accepted by either side. (Employer)

This fact finder didn't really understand the issues. His recommendations made little sense. However, by accident he supported management's position without really understanding why. Since the difference in positions was only 10¢ per hour

for four employees, the union had little choice but to accept. The fact finder wrote a thirty page report on this one issue. It contained a tremendous amount of unnecessary detail and information, including some pretty dubious recommendations concerning the school district's use of a professional negotiator. We think he ran up the work, and thus the cost, beyond necessity.
(Employer)

The legislature realized the necessity for skilled fact finders and in 1977 directed the Board of Personnel Appeals to establish a course of education for the training of fact finders and arbitrators. No person may serve as a fact finder or as an arbitrator under the Montana Public Employees Collective Bargaining Act unless he or she has successfully completed this course, which is conducted by BPA staff and other professionals in the field of labor relations, or equivalent training.

The major factor which helps to ascertain the acceptance of the fact-finding process is the acceptance or rejection of the fact finder's report by the parties. Information regarding acceptance of the fact finder's recommendations was reported for thirteen employers and thirteen employee organizations. Sixty-nine percent of both groups reported accepting the fact finder's recommendations. It was possible to determine the actions of both parties in the same case in ten instances. Of this number, both parties accepted the fact finder's recommendations in four cases and at least one party accepted them in five cases. In only one case did both parties reject the fact finder's recommendations. In cases in which one or both parties did not accept the

recommendations, they were asked to state their reasons for rejection (see Table 9). Employee organizations cited "lack of equity" most often as the reason for rejection while employers cited "impracticality of implementation."

TABLE 9
PARTIES' REASONS
FOR REJECTING RECOMMENDATIONS

Reason	No. of Cases	
	Employee Organizations	Employers
Lack of equity	4	2
"Out of line" with comparable areas	3	1
Impracticality of implementation	2	3
Membership rejected	3	--
Inability to pay	--	1

Finally, the parties and fact finders were asked to evaluate the overall effectiveness of fact-finding in the particular case in which they were involved (see Tables 10 and 11).

TABLE 10
PARTIES' EVALUATION OF FACT-FINDING

	Employee Organizations (%)	Employers (%)	Total (%)
Very Effective . . .	30	50	39
Not Very Effective .	40	--	22
Ineffective	30	37.5	33
Uncertain	--	12.5	6

TABLE 11
FACT FINDERS' EVALUATION OF FACT-FINDING

Evaluation	Percent
Very Effective	31
Effective	31
Not Very Effective	7
Ineffective	--
Uncertain	31

As can be seen from the tables above, while employers rated fact-finding higher than did employee organizations, only 39 percent of the parties reported that fact-finding had been effective in settling their dispute. On the other hand, 62 percent of the fact finders stated that fact-finding had been effective or even very effective in resolving the impasse. It is understandable that the fact finders, after having worked hard at their assignment, would not tend to think their efforts had been in vain. It should also be noted that almost one-third of the fact finders reported being somewhat uncertain about how effective their efforts actually were.

A final caveat regarding the acceptance of fact-finding reports was discussed by Gatewood in his Wisconsin study:

. . . a criterion of effectiveness predicated upon the assumption that either full or partial acceptance of awards implies general acceptance of factfinding, while intuitively appealing, may not be the best standard. The problem stems from the assumption that partially accepted awards support the notion of acceptance of the procedure On the other hand, it may be argued that only the

complete rejection of awards would legitimately imply non-acceptance of the procedure. Therefore although partial acceptance of awards has contributed to a decline in interest in the procedure, this does not connote non-acceptance²⁷ of fact-finding as dispute resolution procedure.

It may be helpful then also to note the relation of the parties' acceptance or rejection of the fact finders' recommendations to their opinion of the effectiveness of the procedure. One hundred percent of both employers and employee organizations who rejected the fact finder's report rated fact-finding as "ineffective." Of the employers who accepted the fact finders' recommendations, two-thirds said fact-finding was "very effective." Of the remaining one-third, one employer was uncertain as to the effect and one expressed dissatisfaction with the fact finder's report even though accepting the recommendations. Of the unions which accepted the fact finder's report, two-thirds said fact-finding was "not very effective" while one-third rated it as "very effective." It appears, then, that employee organizations are generally more critical of the process than are employers, even when accepting the report. Employers, on the other hand, appear to judge fact-finding effective only when the fact finder's recommendations are to their liking. The final conclusion must be that the parties are not overwhelmingly convinced that fact-finding is an acceptable procedure for resolving disputes in contract negotiations.

²⁷ Gatewood, 50.

CASE STUDY

Gilroy noted in his review of public employment impasse resolution procedures that "the effectiveness of fact-finding is very difficult to measure" because "the process is fluid" and that "there has been no accurate manner to standardize the process of review and analysis."²⁸ The main ingredient in evaluating whether or not fact-finding is an effective procedure in the end boils down to whether or not the participants accept it as a procedure that satisfactorily resolves disputes. This is a standard which does not easily lend itself to accurate measurement. For this reason, an in-depth look at one of the fact-finding cases which occurred during the time period studied may help provide a better understanding of the fact-finding procedure, as well as highlight the subjective factors which make the effectiveness of the process so difficult to evaluate.

In the case examined, the employer is the City of Helena. The Union is the International Association of Machinists and Aerospace Workers, Local 231. The bargaining unit represented by the Machinists Union consists of all eligible mechanics, welders, partsmen and service

²⁸Gilroy, 501.

maintenance men employed by the City of Helena at the City Shop. The unit consists of eight members. This is a very small portion of the almost two hundred total employees of the City. Only about 30 percent of the employees of the City are unionized. Besides the Machinists, this number includes the police, firemen and the laborers in several city departments.

At the time of this series of bargaining sessions, the parties had bargained three previous contracts. The Board of Personnel Appeals mediator in this case stated that the parties were fairly sophisticated and knew what they were doing at the bargaining table.

The parties first met on April 19, 1977, to open negotiations on a new contract and had five meetings over the next several weeks. About eighteen major sections of the contract were opened for negotiations. About half of the issues were initially opened by the City and half by the Union. In addition, the Union proposed adding a new section on longevity pay.

In late May or early June, a Board of Personnel Appeals mediator was called in to help the parties reach a settlement. He met with the parties five times. As noted above, the parties were experienced in collective bargaining so the mediation did not serve as any type of education process. The City stated that mediation somewhat reduced the number of issues to be submitted to fact-finding and narrowed the gap between the parties, while the Union said that the

effect of mediation was insubstantial in those areas. The mediator's perception was that the key issue, wages, remained outstanding because the gap between the parties on this issue was so extreme.

With the contract between the parties slated to expire at midnight on Thursday, June 30, 1977, a fact-finding hearing was held on Tuesday, June 28. The Union had voted to strike at a meeting held on the previous Monday.

Thirteen issues had been settled by the time the fact finder arrived on the scene, leaving five major issues and one minor issue remaining to be resolved. The minor issue was the duration of the agreement. The City had proposed a two-year contract while the Union preferred a length of one year. The five major issues concerned wages, fringe benefits and settlement of disputes. The monetary cost of the Union's demands at the point of fact-finding amounted to an increase of 90¢ per hour broken down as follows:

Wages	46¢ per hour
Health Program	24¢ per hour (total family coverage--\$85.51 per month maximum)
Longevity Pay	14¢ per hour
Tool Allowance	6¢ per hour

The City's last offer was a dollar amount equivalent to an increase of 34¢ per hour which the Union could allocate at its discretion. The Union's demands translated to a 17.37 percent increase, and the offer of the City to a 6.5 percent increase.

The contract which expired on June 30 called for disputes going beyond the City Manager level to be handled by the Employee Grievance Board. The three-member Civil Service Commission, appointed by the City Commissioners, served as the Employee Grievance Board. The decision of this board was final. The City was satisfied with this procedure and wished to retain it. The Union proposed instead a Conference Committee, three members of which would be appointed by each party. If this committee could not agree upon a satisfactory solution, then the dispute would be submitted to binding arbitration.

Since it seemed improbable that a meaningful report could be prepared, distributed and considered before the July 1 strike deadline set by the Union, the fact finder made an effort to convince the Union to extend the deadline. But the parties could not agree on the retroactivity aspects of the ultimate agreement and so the Union went on strike as expected on July 1, 1977.

The fact finder reported that at the beginning of the hearing he explored the feasibility of mediation but soon concluded that the Board of Personnel Appeals mediator had capably exhausted that avenue on all issues which were amenable to mediation. The parties were in agreement that this attempt at mediation was generally ineffective, although the City did state that it helped to narrow the gap between the parties.

The fact finder made the following recommendations in his report dated July 6, 1977:

Wages	30¢ per hour increase
Health Program	Increase to \$50.00 per month maximum
Longevity Pay	\$2.00 per each year worked per month paid after the third year of employment
Tool Allowance	No change--as in expired contract
Settlement of Disputes . .	No change-- as in expired contract

The fact finder's rationale for the wage recommendation was based on a comparison of wages paid machinists in the private sector in the City of Helena, in other cities around the state, and in various departments of state government. The fact finder found that these comparisons indicated that the Union was lagging behind other jurisdictions and that they supported the recommended wage increase.

Since the City had offered \$50.00 per month maximum for health insurance coverage to the Union at one time during negotiations and since all non-union City employees were scheduled to receive this benefit beginning July 1, 1977, the fact finder stated that he believed his recommendation was a reasonable one although well below the Union's demand.

The fact finder recommended the inclusion of longevity pay in the contract as a well-recognized device designed to reward and retain loyal and experienced employees. He

believed that the City had accepted this concept in principle when it offered, during the course of prior negotiations, \$1.00 per each year worked per month paid after the third year of employment in response to the Union's demand of \$5.00 per each year worked per month paid. The fact finder stated that his recommendation was a reasonable starting point, expecting that increases would be negotiated from time to time, once longevity pay became a part of the contract.

Since it was not common practice in the area for the employer to provide an allowance for the purchase of tools by the employee, the fact finder did not find an increase in the tool allowance to be justified.

While recognizing that binding arbitration is an effective and widely used procedure for settling disputes and might well have a place in some future contract between the parties, the fact finder did not think a convincing argument had been made for its inclusion. The Union conceded that no real problems had arisen with the dispute settlement procedure to date and the fact finder did not think that the procedure's merit or efficiency had been adequately tested.

The report of the fact finder was accepted by the City but not by the Union. Cited, in order of importance, as reasons for the rejection by the Union were (1) the membership rejected the report; (2) the recommendations were "out of line" with comparable areas; and (3) the report demonstrated a lack of equity.

During a July 7 meeting to discuss the report, the Union accepted the fact finder's recommendations on health insurance, tool allowance and the settlement of disputes, leaving only wages and longevity pay still in dispute. The contract was finally settled on July 9 after mediation by telephone conducted by the fact finder. The final settlement in relation to the proposals of the parties and the fact finder's report is outlined in Tables 12 and 13.

TABLE 12
UNION AND CITY PROPOSALS

Issue	Union	City
Wages	46¢	
Health Program	24¢	34¢
Longevity Pay	14¢	
Tool Allowance	6¢	
Settlement of Disputes	Binding Arb	No Change
Total	90¢	38¢
Increase	17.37%	6.5%

TABLE 13
RECOMMENDATIONS AND FINAL SETTLEMENT

Issue	Fact Finder	Final Settlement
Wages	30¢	32¢
Health Program	12¢	12¢
Longevity Pay	9¢*	8¢*
Tool Allowance	No Change	No Change
Settlement of Disputes	No Change	No Change
Total Increase	51¢ 8.88%	52¢ 9.5%

*\$50.00 per month maximum

**\$2.00 per each year worked per month paid

***\$1.75 per each year worked per month paid

This case generally reflects the major findings reported in the overall study. There does not appear to have been a negative effect on negotiations in this case. Both parties reported that the "hard bargaining" took place before fact-finding (although the Union representative said the Union had to bargain hard before fact-finding to keep what it had and then had to bargain hard during fact-finding to get what it wanted!). Generally, good faith bargaining appears to have been present.

Public interest in this case seems to have been totally absent until a strike became imminent. At that time, news articles began appearing in the local paper. Neither party

perceived that there was any real public interest or that any public pressure was exerted.

An examination of the opinions of the parties involved perhaps sheds the most light on the effectiveness of fact-finding in this specific case, as well as on the effectiveness of the process in general. The City, as noted, accepted the fact finder's report and also rated fact-finding as very effective in helping to achieve a settlement. The City representative believed that the fact finder's report was reasonable and that the fact finder did a good job. The City accepted the report because it was believed that if the Union did not accept it, the City would have the tactical advantage. The City representative believed that if the Union continued to hold out, in the face of the fact finder's recommendations, the City could then pressure the Union to settle by informing the public of the Union's refusal to accept the fact finder's report. Theoretically, in fact-finding public interest is supposed to be spontaneously brought to bear upon the parties in response to the publication of the recommendations of the fact finder. But the City representative pointed out that this usually is not the case in real life. Therefore, the party which wishes to use public interest as a pressure tactic must conduct a public relations campaign to generate public interest in and support for its particular position. In cases in which the gap between the parties is extreme, the role of public interest may be more significant than it

might seem at first glance. Parties may not often perceive any great public interest in their negotiations, but the knowledge that public interest might be generated as a tactic by the opposing party could cause the recalcitrant party to feel some pressure to settle. Spero and Capozzola point out that ". . . a prime advantage of fact-finding is that insubstantial or extreme demands tend to lose their force in this forum."²⁹ Thus, even if there is no public interest at all in the dispute, the mere publication of extreme proposals or rigid positions of one party or the other may cause the party to reevaluate its position.

The Union, on the other hand, rejected the fact finder's recommendations and rated fact-finding as ineffective in this case. The Union spokesman is an International Representative for the Machinists Union. He negotiates about one hundred contracts per year. Of this number, only eleven contracts are in the public sector while the remainder are with private sector employers. As can be expected, the Union representative is impatient with the public sector impasse procedures. He views fact-finding as "just another step we have to go through." Even though he is impatient with the public sector procedures, he does not think that strikes in the public sector have the significant effect they do in the private sector. In his view, fact-finding is not as effective in settling disputes as is the tenacity and

²⁹Spero and Capozzola, 284.

perseverance of the parties--how long the Union members are willing to hold out on the picket line. But tax monies are not like corporation profits. They keep rolling in even though the employees are on strike. Since Unions do not find public sector strikes effective in most cases, the Machinists' representative favors binding arbitration as a means of settling bargaining disputes. Changing attitudes may also be affecting public employers. Employers are becoming more willing to "take" a strike because, through utilizing efficient management techniques, they are able to continue to deliver services during a strike and even save money at the same time. Indeed, the City representative in this case described various "strike plans" that the City Management devised even before negotiations started. In the case of the strike by the Machinists, the unionized laborers honored the picket lines. Thus City management personnel was called upon to drive garbage trucks to insure continuation of city services. The Machinists' representative was of the opinion that unions would receive more favorable decisions from arbitrators settling disputes through binding arbitration than they are receiving from fact finders. His complaint was that fact finders do not delve deep enough into such issues as wage comparisons, budgets, cost of living, and so on.

The fact finder in this case rated fact-finding as very effective in helping to reach a settlement. This fact finder stated, partially because his report is

recommendatory in nature and not binding, he feels more comfortable in a mediation-like atmosphere rather than a formal hearing. This allows him to ascertain the real priorities of the parties and to determine the intensity of their positions which then gives him a better idea of what will be acceptable. In this case, the final settlement was only a penny more than what he had recommended, so it appears that the fact finder did a good job of judging acceptability.

The fact finder pointed out that there may be factors, other than the issues under negotiation, which contribute to the extreme gaps between parties which lead to deadlocks. The attitudes of the participants may stand in the way of agreement. Especially in the public sector, employers have not yet accepted the idea of unions and collective bargaining in many locales. Sometimes union representatives want to put on a show at the bargaining table to further their own position, or they are guided by other considerations relating to internal union politics. Management representatives might also be motivated by personal ambition. Sometimes there are personality conflicts between the representatives at the bargaining table. While the monetary issues did play a significant part in the deadlock between the Machinists and the City of Helena, it appears that some type of attitudinal blocks also may have been present. The City representative characterized himself a number of times as "strong management" oriented. The Union representative

evidenced some bitterness at the general lack of support for labor in Helena and mentioned that several items being bargained for by the Machinists, longevity pay and increased health insurance, had already been given to non-unionized employees of the City while his union had to bargain to impasse for them.

The fact finder pointed out that he believed that fact-finding is effective because it provides another chance for the parties to come together at the table and resolve their dispute. He also noted that it provides a chance for the parties to "save face." When one party or the other, for whatever reason, continues to make extreme proposals or continues an unyielding position, the fact-finding process may allow the recalcitrant party to back down and still retain some dignity. For example, the representative of an employee organization who continues, during the course of bargaining, to threaten a strike unless a high wage demand is met has also had to convince his constituents that this course of action is in the best interest of the members of the employee organization. He does this so that he will be sure of their continued support, even though he may know it is an unreasonable demand. A fact-finding report which recommends a more reasonable wage increase can be used by the bargainer to convince his constituents that the recommended amount is, indeed, perhaps the best they can expect. The blame for not winning the high wage demand is then deflected from the bargainer to the fact finder and/or the

fact-finding process. But in any case, the dispute is settled.

While fact-finding was not effective in forestalling a strike in this case, the strike was probably of considerably shorter duration than it would have been without the availability of fact-finding, given the wide gap between the parties. Since prior mediation seems to have been utilized to the utmost and there still remained that broad gap between the parties, it may be that fact-finding was successful for the very reason cited above. It provided an opportunity for the parties to come together one more time and to "save face." The Union gave up its demands concerning the settlement of disputes and tool allowance while getting a little more in wages and fringe benefits. The City was able to preserve the status quo in certain areas by giving a little more money.

CONCLUSION

William E. Simkin, a champion of mediation, has pointed out one of the problems being faced more and more often in fact-finding:

In many jurisdictions, public employee wages and some working conditions have lagged so far behind comparable private wages and practices that a report acceptable to employees has been likely. As public employees close the gap, it will be increasingly difficult to develop recommendations that are acceptable to both sides. In other words, fact-finding will continue to be important in the public sector as a reluctant step beyond mediation, but mutual acceptability will be increasingly hard to obtain.³⁰

This appears to be the case in Montana, although compared to the experiences in other states, fact-finding is working well in this state. Fact-finding scores high in that it has a positive effect on the collective bargaining process. On the other hand, there do not appear to be adequate deterrents to its use, although in actual practice there does not seem to be an overdependency on fact-finding. In terms of bargaining theory, the fact-finding process in Montana seems to raise the cost of continuing the dispute higher than the cost of making a compromise or

³⁰Simkin, p. 349.

a concession. By doing so, fact-finding helps to encourage settlement.

Fact-finding's biggest failing appears to be in its acceptance by the parties, 55 percent of which rate it as not very effective or ineffective. While 60 percent of the parties accepted the fact finders' recommendations, many appeared to have done so grudgingly. This is reflected in some of the comments of the respondents:

I feel that fact-finding as it exists is ineffective and as long as it remains a statutory provision, it serves only as a delay factor for the unions. (Employer)

. . . fact-finding is costly, useless and time consuming . . . It has been used many times with favorable results in other states. Apparently there is no public interest in Montana. (Employee Organization)

I feel that fact-finding should precede mediation if possible. (Employer)

I personally would like to see fact-finding taken out. I think it's a waste of time and money. It serves to let the employer have a month or two to stall and use the money which should be in the men's pocket. (Employee Organization)

This dissatisfaction with fact-finding may be reflected in some options to the present impasse resolution procedures which are appearing in Montana. During the summer of 1979, for the first time, a public employer and a labor organization opted to submit their contract dispute to final and binding arbitration. A bill providing for compulsory interest arbitration in fire fighters collective bargaining was passed in the last Montana legislative session. Especially in the light of these events, it is important that we

understand the limitations and potential of the current impasse resolution procedures as well as all of the available options--binding arbitration, fact-finding followed by mediation, "med-arb," arbitration followed by negotiations and so on. The more we learn, the more we probably will be convinced of the futility of searching for the "one best way" for resolving all collective bargaining disputes. Instead we will become better prepared to design alternative systems to meet different policy objectives or to adapt to changing circumstances in the field of public employee collective bargaining in Montana.

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